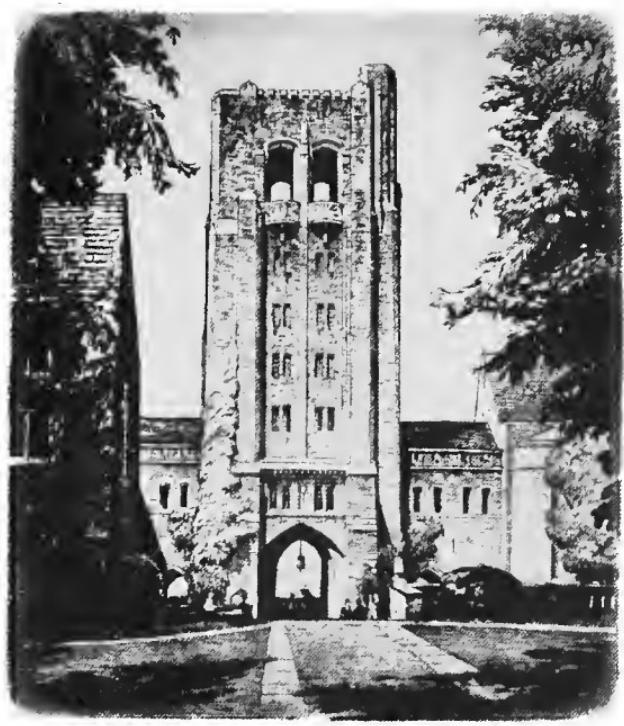


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AN ACT TO MAKE UNIFORM THE LAW OF SALES
OF GOODS.



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AN ACT

To Make Uniform

The Law of Sales of Goods

Approved by

Conference of Commissioners on
Uniform State Laws

And Recommended for Adoption
In all the States

AUGUST, 1906

CHARLES THADDEUS TERRY
President
100 Broadway, New York, N. Y.

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AN ACT
To MAKE UNIFORM THE LAW OF SALES OF GOODS.

PART I.

FORMATION OF THE CONTRACT.

SECTION 1. [Contracts to Sell and Sales.] (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3) A contract to sell or a sale may be absolute or conditional.

(4) There may be a contract to sell or a sale between one part owner and another.

The most fundamental distinction in the law of sales is between a contract to sell in the future and a present sale. The phrase "contract of sale" used in the English Act has been discarded. An explanation of the reasons on which this and the other sections of the act are based, fuller than is possible in brief annotations, may be found in Williston on Sales.

SEC. 2. [Capacity—Liabilities for Necessaries.] Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

This section states the prevailing, though not wholly uniform, doctrine of the existing law. Mechem on Sales, §122 *et seq.* The section follows *verbatim* section 2 of the English Act except that the

words "the sale and" which precede the last word in the section are omitted as introducing a possible ambiguity.

FORMALITIES OF THE CONTRACT.

SEC. 3. [Form of Contract or Sale.] Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

This follows the first part of section 3 of the English Act. That act contains the following proviso which was omitted as unnecessary:

"Provided that nothing in this section shall affect the law relating to corporations."

SEC. 4. [Statute of Frauds.] (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Ohio \$2500.00; Connecticut \$100.00.

Sub-section (1) of this section follows section 4 (1) of the English Act with the exceptions stated below.

The words of the section of the English Act are somewhat altered from those of the seventeenth section of the Statute of Frauds, but the changes are such as to express more accurately the construction previously given by Lord Tenterden's Act and by the courts to the Statute of Frauds. See Chalmers (5th ed.), 16.

In the United States a provision corresponding to the seventeenth section of the Statute of Frauds exists in all the states but Alabama, Arizona, Delaware, Illinois, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and West Virginia.

The words "or choses in action" have been inserted to settle a doubt whether such property is within the statute. Similar words or the broad term "personal property" are found in the Statutes of Frauds now in force in about twenty of the states. Mechem on Sales, §287.

The limit of price or value varies considerably in this country, fifty dollars is the commonest limit, but as many important states have no statute corresponding to this section of the Statute of Frauds, it seemed wise to raise the limit of price considerably. Sub-section (2) is intended to reproduce the rule laid down by Shaw, C. J., in *Mixer vs. Howarth*, 21 Pick. 205, and by Ames, J., in *Goddard vs. Binney*, 115 Mass. 450 which has found most support in this country. Mechem, §326.

Sub-section (3) differs from the corresponding English provision, but represents the American rule, as well as the early English rule. See Mechem, §357 *et seq.*

SUBJECT MATTER OF CONTRACT.

SEC. 5. [Existing and Future Goods.] (1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

This section follows section 5 of the English Act except that contract to sell is here as elsewhere substituted for "contract of sale" and "contract for the sale." Also in sub-section (3) "parties pur-

port" is substituted for "seller purports." As the intention of the buyer is as important as that of the seller, the substituted expression is the more accurate.

SEC. 6. [Undivided Shares.] (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

These provisions are new, and 6 (2) at least probably does not express the English law. It expresses the doctrine of *Kimberly vs. Patchin*, 19 N. Y. 330, which is supported by the weight of recent American authority, though there are adverse decisions. See Mechem, §704 *et seq.*

SEC. 7. [Destruction of Goods Sold.] (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale:

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible,

or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Sub-section (1) corresponds to section 6 of the English Act. The English section does not seem to cover the contingency of deterioration or partial destruction and sub-section (2) has been added for that purpose. The section is believed to express the existing law.

SEC. 8. [Destruction of Goods Contracted to be Sold.] (1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract:

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

Sub-section (1) corresponds to section 7 of the English Act. Sub-section (2) is added to cover the case of deterioration or partial destruction. The section is believed to express the existing law.

THE PRICE.

SEC. 9. [Definition and Ascertainment of Price.] (1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Sub-sections (1) and (4) are substantially the same as section 8 of the English Act. Sub-section (2) is changed from the English law which in section 1 (1) requires a "money consideration." As the rules of law applicable to barter are the same as those applicable to sale, it seemed desirable to bring cases of barter within the meaning of sale in this draft. On the other hand, different principles are often applicable where a bargain concerns real estate and such cases are, therefore, expressly excluded by sub-section (3).

SEC. 10. [Sale at a Valuation.] (1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Slightly varied from section 9 of the English Act.

CONDITIONS AND WARRANTIES.

SEC. 11. [Effect of Conditions.] (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 11 of the English Act authorizes not only the waiver of a condition, but the election to treat any condition to be fulfilled by the seller as a breach of warranty. The use of condition as including promise or warranty does not seem happy. It is very unfortunate if the distinction between conditions and promises should become obliterated, for the legal ideas are distinct and should have distinct names.

SEC. 12. [Definition of Express Warranty.] Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

The English Act does not define when language amounts to warranty. There is considerable division of authority on the point. On theory the fundamental basis for liability on warranty is the justifiable reliance on the seller's assertions. Whether the buyer was justified in his reliance depends not on the intent of the seller, but on the natural tendency of his acts. As a practical matter, the section as drawn does not seem to set up an unreasonably high standard of morality. The tendency of the courts has been distinctly in the direction of greater strictness against seller's statements. See Mechem, p. 1072, note 1.

SEC. 13. [Implied Warranties of Title.] In a contract to sell or a sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell

by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

This section is copied from the English section 12, except (4), which is an addition. There are a few American decisions and more dicta that there is no warranty of title where the vendor is out of possession. But the weight of recent authority is against this distinction. See Mechem, §1302. (4) represents the English as well as the American law, and it seemed best to make an express provision.

SEC. 14. [Implied Warranty in Sale by Description.] Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

This section is identical in meaning with section 13 of the English Act.

SEC. 15. [Implied Warranties of Quality.] Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

- (5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

This section follows section 14 of the English Act.

SALE BY SAMPLE.

SEC. 16. [Implied Warranties in Sale by Sample.] In the case of a contract to sell or a sale by sample:

- (a) There is an implied warranty that the bulk shall correspond with the sample in quality.
- (b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).
- (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

This follows substantially section 15 of the English Act.

PART II.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

SEC. 17. [No Property Passes until Goods are Ascertained.] Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

This section follows section 16 of the English Act except for the addition of the clause beginning "but," etc. See under section 6 for explanation of the difference between English and American law on the point referred to.

SEC. 18. [Property in Specific Goods Passes when Parties so Intend.] (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Follows section 17 of the English Act.

SEC. 19. [Rules for Ascertaining Intention.] Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

This section follows section 18 of the English Act with some changes. The first rule is altered by omitting from the end the words "and the buyer has notice thereof." The insertion of these words in the English Act changed the English law, which had never required notice (see Chalmers, p. 46), in order to make it conform to the Scotch law. There seems no good reason for postponing the transfer of title to this extent. There is no American authority for it.

The English Rule 3 which is omitted is as follows:

"Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done."

This rule of presumption is artificial and has been discarded in New York and some other states. See Mechem, §§15 *et seq.* It was, therefore, deemed wise to omit it.

Rule 3 (1) is not in the English Act. In that act, a "sale or return" is included in the provision corresponding to Rule 3 (2) of this draft (section 18, Rule 4 of English Act), thereby making the same presumption apply to such sales as to sales on trial. The distinction between a sale with a right to return and a sale to take effect on approval has not been taken in the English decisions, though Chalmers notices it in his annotation. 9 Harv. L. Rev. 110, n. 3. The distinction has been taken in this country (Mechem, §657 *et seq.*, §675 *et seq.*), and it seems proper to indicate it in this draft.

Rule 3 (2) is the same as Rule 4 of the English Act, except that the words "on trial or on satisfaction" are substituted for "on sale or return."

In Rule 4 (2) the last sentence is not in the English Act. It settles a disputed question in accordance with the weight of authority. See 4 Columbia L. Rev., 541; Mecham, §§733, 741.

Rule 5 is not in the English Act, but it represents the existing law.

SEC. 20. [Reservation of Right of Possession or Property when Goods are Shipped.] (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange; and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Sub-section (1) follows with some change of expression, section 19 of the English Act except that for the somewhat loose phrase "right of disposal" is substituted "possession of property."

The first sentence of sub-section (2) is in the English Act, except that "property in the goods" is substituted for "right of disposal." The remainder of the sub-section is new.

Sub-section (3) is not in the English Act, but is thought to be warranted by the existing law.

Sub-section (4) substantially follows the English Act as far as the words "If, however," The proviso beginning "If, however," is not in the English Act. It expresses, nevertheless, the English law, because of the last factors' act. *Cahn vs. Packet Co.* (1899), 1 Q. B. 643. It undoubtedly is in accordance with mercantile understanding and convenience. The seller has trusted the buyer with the possession of the document of title and should bear the consequences. See Mechem, §166.

SEC. 21. [Sale by Auction.] In the case of sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

This follows section 58 of the English Act, and is believed to express the existing law.

SEC. 22. [Risk of Loss.] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

The exception (a) is not contained in the English Act. Otherwise the section is in substance the same as section 20 of the English Act. The new exception represents the weight of authority and seems sound on principle. The principal situation at which it is aimed is where a conditional sale has been made, the goods, delivered to the buyer, and very likely in use by him. The title is retained instead of taking a mortgage back, as would be done in the case of real estate. The beneficial interest is in the buyer, and the risk should be on him. See 9 Harv. L. Rev. 109; Mechem, §635.

Where goods are sent in compliance with an order, but marked "C. O. D." even though the effect of this were to withhold the title

(as to which, however, see section 19, Rule [2]), the risk would be thrown on the buyer. See Mechem, §740, note (p. 616).

TRANSFER OF TITLE.

SEC. 23. [Sale by a Person not the Owner.] (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this act, however, shall affect:

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

This follows section 21 of the English Act, except in (2) (a) "recording acts" has been added.

SEC. 24. [Sale by One having a Voidable Title.] Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

This follows section 23 of the English Act. Section 22 of that act relates to sales in market overt and is omitted here.

SEC. 25. [Sale by Seller in Possession of Goods Already Sold.] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

This follows section 25 (1) of the English Act. It is comparatively new to the English law, being first enacted in the Factors' Act of 1889. But, so far as purchasers are concerned, it states in effect the principle commonly laid down in this country, that delivery is not necessary between the parties, but is as against third persons. The rights of creditors are dealt with in the next section.

SEC. 26. [Creditors' Rights Against Sold Goods in Seller's Possession.] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

The law in this country as to the effect of retention of possession on the rights of creditors is in such conflict and the different rules are locally so firmly fixed that it seemed unwise to try to provide a uniform rule. All states, however, agree that if the retention is fraudulent in fact, the sale is void as to creditors. The draft, therefore, so provides, and as to other cases—cases of constructive fraud—adopts the locally prevailing rule.

SEC. 27. [Definition of Negotiable Documents of Title.] A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

This definition, following as it does the definition of negotiable promises to pay money, represents the mercantile understanding in regard to documents of title.

SEC. 28. [Negotiation of Negotiable Documents by Delivery.] A negotiable document of title may be negotiated by delivery—

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title

has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Here too, both mercantile practice and the analogy of bills and notes are followed.

SEC. 29. [Negotiation of Negotiable Documents by Indorsement.] A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

The note to the preceding section is again applicable.

SEC. 30. [Negotiable Documents of Title Marked "Not Negotiable."] If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable" "non-negotiable," or the like.

It has been until recently the custom of the railroads to stamp upon bills of lading, even though running to order or assigns, the words "not negotiable." How far the carrier is justified in attempting to limit its liability by such a device may be questioned, but as this act is concerned not with the liability of the carrier but with the rights of the various holders of the bill of lading as against each other, it seemed wise to provide merely that as between those parties the words "not negotiable" do not change the legal effect of the document.

SEC. 31. [Transfer of Non-Negotiable Documents.] A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

The distinction between warehouse receipts and bills of lading negotiable in form and those which are not does not seem to be observed in the English decisions; but it is observed in this country both in the usages of warehousemen and carriers and in the decisions of the courts. See *Hallgarten vs. Oldham*, 135 Mass. 1; *Gill vs. Frank*, 12 Oreg. 507; *Forbes vs. Boston & Lowell R. R.*, 133 Mass. 154; *Litchfield Bank vs. Elliott*, 83 Minn. 469.

SEC. 32. [Who may Negotiate a Document.] A negotiable document of title may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

By this section a negotiable document of title is not given the full negotiability of a bill of exchange, inasmuch as neither a thief nor a finder is within the terms of the section. By the Uniform Bills of Lading Act, however, the Commissioners on Uniform State Laws adopted the principle of full negotiability. In a jurisdiction where it is desired that the Sales Act and the Bills of Lading Act should both be passed and should be in harmony, the following substitute is suggested for section 32 of the Sales Act as above printed:

Sec. 32. [Who may Negotiate a Document.] A negotiable document may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the document, the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery.

SEC. 33. [Rights of Person to Whom Document has been Negotiated.] A person to whom a negotiable document of title has been duly negotiated acquires thereby;

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

This section follows the custom of merchants. It makes the document represent the depositor's right in the goods, so that a purchaser of the document, if he acquires a good title thereto, acquires not simply the rights of his vendor, but whatever property the original depositor had, that being what the document represented. 32 (b) makes the obligation of the warehouseman in regard to the goods negotiable.

Many states already have statutes making warehouse receipts negotiable. Mohun on Warehousemen, 944; and some states have statutes in regard to bills of lading, *ibid.*, 848, but these statutes have generally been so brief and general in terms that they have been variously construed and have to some extent failed of their purpose. See *Shaw vs. Railroad Co.*, 101 U. S. 557.

SEC. 34. [Rights of Person to Whom Document has been Transferred.] A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent pur-

chaser from the transferor of a subsequent sale of the goods by the transferor.

This section states the right of any purchaser of bailed goods. One who purchases, therefore, a non-negotiable document of title would gain nothing from the transfer of the document except evidence.

SEC. 35. [Transfer of Negotiable Document without Indorsement.] Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

This follows the analogy of bills and notes. Crawford, Neg. Inst. Law, §79.

SEC. 36. [Warranties on Sale of Document.] A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a) That the document is genuine;
- (b) That he has a legal right to negotiate or transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

This section except (d) follows the Negotiable Instruments Law, Crawford, §115. (d) it is believed states the existing law.

SEC. 37. [Indorser not a Guarantor.] The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Mercantile usage in regard to documents of title differs from that in regard to bills and notes in the matter to which this section relates.

It states the existing law, even in jurisdictions where statutes have made documents of title negotiable.

Shaw vs. Railroad Co., 101 U. S. 557; *Mida vs. Geissmann*, 17 Ill. App., 207.

SEC. 38. [When Negotiation not Impaired by Fraud, Mistake or Duress.] The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

This section merely elaborates for the sake of clearness certain special cases within the terms of section 32.

SEC. 39. [Attachment or Levy upon Goods for which a Negotiable Document has been Issued.] If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

If the mercantile theory of documents of title, such as bills of lading and warehouse receipts, were carried to its logical extent, no attachment of the goods represented by the document or levy upon them could be permitted while the negotiable document was outstanding.

It was thought best in this draft not to take the extreme position that no attachment, garnishment or levy could be made on property for which a negotiable document was outstanding, but to cover the essential practical point by making it a condition of the validity of such seizure that the negotiation of the document be enjoined or the document impounded. The following section expressly gives the court full power to aid, by injunction and otherwise, a creditor seeking to get at a negotiable document and the property covered thereby.

SEC. 40. [Creditors' Remedies to Reach Negotiable Documents.] A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

As the right of legal garnishment of bailed property is limited by the preceding section, section 40 gives the creditor such rights as are included under the heads of bills of equitable attachment or in aid of execution.

PART III.

PERFORMANCE OF THE CONTRACT.

SEC. 41. [Seller must Deliver and Buyer Accept Goods.] It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

This follows section 26 of the English Act.

SEC. 42. [Delivery and Payment are Concurrent Conditions.] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

This follows section 27 of the English Act.

SEC. 43. [Place, Time and Manner of Delivery.] (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

This is the same as section 29 of the English Act, except that the second half of sub-section (3) has been added. The section is believed to state the existing law.

SEC. 44. [Delivery of Wrong Quantity.] (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not

included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

This follows section 30 of the English Act, and is in accordance with the weight of authority. See Mechem, §1157 *et seq.*

SEC. 45. [Delivery in Instalments.] (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

This section is slightly altered from section 31 of the English Act. The English Act, following prior English decisions, makes repudiation by one party the test of the right of the other to refuse to go on. The section here given makes the materiality of the breach the test. This is in accord with the weight of American authority. *Norrington vs. Wright*, 115 U. S. 188, 14 Harv. L. Rev. 323.

SEC. 46. [Delivery to a Carrier on Behalf of the Buyer.] (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the

other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit; and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

These paragraphs follow with slight changes section 32 of the English Act. (1) is familiar law. (2) and (3) are probably in accordance with the business usage, but there is little in the way of positive law on the subject. See Chalmers (5th ed.), p. 73.

SEC. 47. [Right to Examine the Goods.] (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 47 (1) and (2) follow section 34 of the English Act, and state the American law also. Mechem, *f1375 et seq.* Sub-section (3) is new. It states the actual practice of the large express companies and probably states the existing law. *Wiltse vs. Barnes*, 46 Ia. 210.

SEC. 48. [What Constitutes Acceptance.] The buyer is deemed to have accepted the goods when he intimates to the seller

that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

This follows section 35 of the English Act, and represents the American law also. Mechem, §1379 *et seq.*

SEC. 49. [Acceptance does not Bar Action for Damages.] In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

This section is not contained in the English Act, but section 11 (1) (a) of that act seems to authorize the buyer to accept goods and nevertheless hold the seller liable in damages. The latter half of the section in this draft imposes a qualification sanctioned by good business practice and to some extent by law, both in this country and in Europe.

The law in this country is in great conflict. See Mechem, §1388 *et seq.*

SEC. 50. [Buyer is not Bound to Return Goods Wrongly Delivered.] Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

This follows section 36 of the English Act. Such American authority as there is is in accord. Mechem, §1403.

SEC. 51. [Buyer's Liability for Failing to Accept Delivery.] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care

and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the right against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

This follows substantially section 37 of the English Act, except for the addition of breach of the entire contract as an equivalent of repudiation. See note to section 45.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

SEC. 52. [Definition of Unpaid Seller.] (1) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

- (a) When the whole of the price has not been paid or tendered.
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.
- (2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

This follows section 38 of the English Act, except that in (1) (b) "has been broken" is substituted for "has not been fulfilled" and "the insolvency of the buyer" has been inserted.

SEC. 53. [Remedies of an Unpaid Seller.] (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

- (a) A lien on the goods or right to retain them for the price while he is in possession of them;
- (b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

- (c) A right of resale as limited by this act;
- (d) A right to rescind the sale as limited by this act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

This follows section 39 of the English Act, except for the insertion of 1 (d), which is in conformity with the American law and with business usage. Mechem, §1682.

UNPAID SELLER'S LIEN.

SEC. 54. [When Right of Lien may be Exercised.] (1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

- (a) Where the goods have been sold without any stipulation as to credit;
- (b) Where the goods have been sold on credit, but the term of credit has expired;
- (c) Where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

This follows section 41 of the English Act.

SEC. 55. [Lien After Part Delivery.] Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

This follows section 42 of the English Act.

SEC. 56. [When Lien is Lost.] (1) The unpaid seller of goods loses his lien thereon—

- (a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving

the property in the goods or the right to the possession thereof;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

This substantially follows section 43 of the English Act.

STOPPAGE IN TRANSITU.

SEC. 57. [Seller may stop Goods on Buyer's Insolvency.] Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

This follows section 44 of the English Act with two exceptions. In the last clause the English Act reads, "and may retain them until payment or tender of the price." But the seller under such circumstances has also the right to resell, and under this draft the right to rescind the sale. In the second line the words "is or" have been inserted, so as to make it clear that the seller's right exists even though the buyer were insolvent at the time of the sale. See Mechem, §1541.

SEC. 58. [When Goods are in Transit.] (1) Goods are in transit within the meaning of section 57—

(a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of section 57,

- (a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;
 - (b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;
 - (c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.
- (3) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.
- (4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

This follows section 45 of the English Act, but with considerable changes in wording and arrangement. The section is believed to state the existing law.

SEC. 59. [Ways of Exercising the Right to Stop.] (1) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be

obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

This follows section 46 of the English Act, except the final proviso. The carrier should be liable to a *bona fide* transferee of its bill of lading, and unquestionably would be at common law if the transferee took for value before the stoppage. Even though the transferee took after the notice of stoppage, he is protected by section 62. The carrier therefore ought not to be obliged or allowed to surrender the goods unless the document of title is surrendered.

RESALE BY THE SELLER.

SEC. 60. [When and how Resale may be Made.] (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

This section differs considerably from section 48 of the English Act. The wording of that section did not seem wholly adequate.

Section 48 (2) of the English Act seems to provide that the resale, whether rightly made or not, so long as it is made by a seller having a lien, gives a good title, and section 8 of the Factor's Act of 1889, providing that any seller in possession has power to make a valid sale or pledge, squares with this; but the provision seems somewhat drastic for this country. See Mechem, § 1644. The requirements as to delivery and change of possession in this draft would generally protect the purchaser on the resale if he got delivery, and this seems far enough to go.

The point covered by (3) is much disputed. The English law requires notice where the goods are not perishable, and some cases so hold in this country. Others reach a contrary result. See Mechem, §1633. On the one hand, it seems undesirable to make a resale invalid under all circumstances for lack of notice. The lapse of time or other circumstances might make it highly unjust to allow the buyer later, when perhaps market prices had risen, to make such a claim. On the other hand, it seems desirable that notice should generally be given. The provision suggested will have the effect, it is hoped, of making notice necessary unless the default of the buyer is very clear and long continued. (4) expresses the law. Mechem, §1637.

RESCISSON BY THE SELLER.

SEC. 61. [When and how the Seller may Rescind the Sale.]

(1) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the

intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

This section is not contained in the English Act, and the remedy for which the section provides is not allowed by English law. It is allowed in this country, and seems fully justified by mercantile custom and convenience. Mechem, §§1681, 1682; Burdick, p. 243.

SEC. 62. [Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.] Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

This section is based on section 47 of the English Act. The second paragraph is, however, made more far reaching than in the English Act in order to cover a case which does not seem to have arisen or to have been considered in England, namely, where a bill of lading is transferred to an innocent purchaser for value after notice to stop has been given. The only case in *Newhall vs. Central Pac. R. R.*, 51 Cal. 345, which properly protects the purchaser.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

REMEDIES OF THE SELLER.

SEC 63. [Action for the Price.] (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title,

and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

(1) and the first half of (2) follow the English Act. The addition to (2) beginning "but," etc., is believed to be justified by the weight of American authority.

(3) is not law in England, nor is it in a number of American states. On the other hand, the New York court, in an often quoted passage, allows the remedy to an unpaid vendor generally without any qualification as to the nature of the goods. It is also allowed in the civil law. The rule suggested goes as far as convenience requires, for if the goods can readily be resold, the action for damages affords adequate relief. See Mechem, §1694.

SEC. 64. [Action for Damages for Non-Acceptance of the Goods.] (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

This follows section 50 of the English Act, except (4), which is added. (4) is not law in England, but it is in this country except in Illinois. See 14 Harv. L. Rev. 422; Mechem, §1700 *et seq.* The provision does not require the seller to cease performance in every case. There may be cases where the damage caused by stopping performance would be greater than that caused by finishing the necessary work. See Southern Cotton Oil Co. *vs.* Heflin, 99 Fed. Rep. 339. In such a case the seller might complete performance, and recover damages based on completed performance.

SEC. 65. [When Seller may Rescind Contract or Sale.] Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Section 61 allows the seller to rescind the transfer of title in the cases there covered. The rescission of all contractual obligation between the parties—a more extensive right—is covered by this section, which, is believed to express the American law.

REMEDIES OF THE BUYER.

SEC. 66. [Action for Converting or Detaining Goods.] Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

This section, which is not contained in the English Act, allows trover, replevin, equitable, or other relief, as the local law may warrant.

SEC. 67. [Action for Failing to Deliver Goods.] (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

This follows section 51 of the English Act.

SEC. 68. [Specific Performance.] Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

This follows, with slight changes in wording, section 52 of the English Act.

SEC. 69. [Remedies for Breach of Warranty.] (1) Where there is a breach of warranty by the seller, the buyer may, at his election—

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

This section differs materially from the corresponding section of the English Act—section 53. This draft allows rescission as a remedy for breach of warranty. The English law does not. In defence of the remedy of rescission, see an article by the draftsman in 16 Harv. L. Rev. 465. Further, the English Act, following Mendel *vs.* Steel, 8 M. & W. 858, allows the buyer to recoup his damages in an action for the price and thereafter to bring an action for damages. This seems erroneous, see Watkins *vs.* American Bank, 134 Fed. Rep. 36 (C.C.A.), and has been changed in this draft.

SEC. 70. [Interest and Special Damages.] Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

This follows section 54 of the English Act.

PART VI.

INTERPRETATION.

SEC. 71. [Variation of Implied Obligations.] Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

This follows section 55 of the English Act.

SEC. 72. [Rights may be Enforced by Action.] Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

This follows section 57 of the English Act.

SEC. 73. [Rule for Cases not Provided for by this Act.] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

This provision seems obviously desirable.

SEC. 74. [Interpretation Shall Give Effect to Purpose of Uniformity.] This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it.

The rule in this section obviously states a proper principle in regard to a statute the primary object of which is to make the law uniform. The same provisions will be found in the Uniform Transfer of Stock Act, Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act. The Courts of last Resort have applied this rule to the Uniform Negotiable Instruments Act. This principle was long ago recognized in *Swift vs. Tyson* (1842) 16 Peters 1, 19, 20.

SEC. 75. [Provisions not Applicable to Mortgages.] The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

This follows section 60 (2) of the English Act, except for the words "unless so stated." Though the draft does not generally purport to deal with the peculiar rules of mortgage law, there are a few places in which mortgage relations or similar ones are covered, e. g., sections 20 (2), 22 (a).

SEC. 76. [Definitions.] (1) In this act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

“Divisible contract to sell or sale” means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

“Document of title to goods” includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

“Fault” means wrongful act or default.

“Fungible goods” means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

“Goods” include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

“Order” in sections of this act relating to documents of title means an order by indorsement on the document.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

“Plaintiff” includes defendant asserting a right of set-off or counterclaim.

“Property” means the general property in goods, and not merely a special property.

“Purchaser” includes mortgagee and pledgee.

“Purchases” includes taking as a mortgagee or as a pledgee.

“Quality of goods” includes their state or condition.

“Sale” includes a bargain and sale as well as a sale and delivery.

“Seller” means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

" Specific goods " means goods identified and agreed upon at the time a contract to sell or a sale is made.

" Value " is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

(2) A thing is done " in good faith " within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4) Goods are in a " deliverable state " within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

The only one of these definitions requiring comment is that of value, which follows the weight of authority at common law and the provision of the Uniform Negotiable Instruments Act as intended by its framers. In regard to property other than negotiable instruments the law of many states does not regard an antecedent debt as value; but it seems desirable to have a single rule for what constitutes valuable consideration, and mercantile convenience support the one adopted. It is supported, moreover, by the law of England and a few of our states. See Williston on Sales, §619.

SEC. 76a. [Act does not Apply to Existing Sales or Contracts to Sell.] None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this act.

This section was added in 1909 primarily to avoid a question which was raised in Massachusetts where the act was passed without this section. It was questioned whether section 4 of the act as it related to the enforcement of a sale, or contract to sell, rather than to its original validity, did not apply to any litigation arising after the passage of the act without reference to when the sale or contract to sell which was the subject of the litigation, arose. See Williston on Sales, p. 1042. A similar section is found in all the other Uniform Acts.

SEC. 76b. [No Repeal of Uniform Warehouse Receipt Act or Uniform Bills of Lading Act.] Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the Act to Make Uniform the Law of Warehouse Receipts, or of the Act to Make Uniform the Law of Bills of Lading.

This section was added in 1909 especially to avoid the possible effect of section 32 of the Uniform Sales Act upon section 31 of the Uniform Bills of Lading Act. Where neither the Uniform Warehouse Receipts Act nor the Uniform Bills of Lading Act has been passed prior to the passage of the Uniform Sales Act, this section may be omitted.

SEC. 77. [Inconsistent Legislation Repealed.] All acts or parts of acts inconsistent with this act are hereby repealed except as provided in section 76b.

SEC. 78. [Time When the Act Takes Effect.] This act shall take effect on the.....day of.....one thousand nine hundred and.....

SEC. 79. [Name of Act.] This act may be cited as the Uniform Sales Act.

